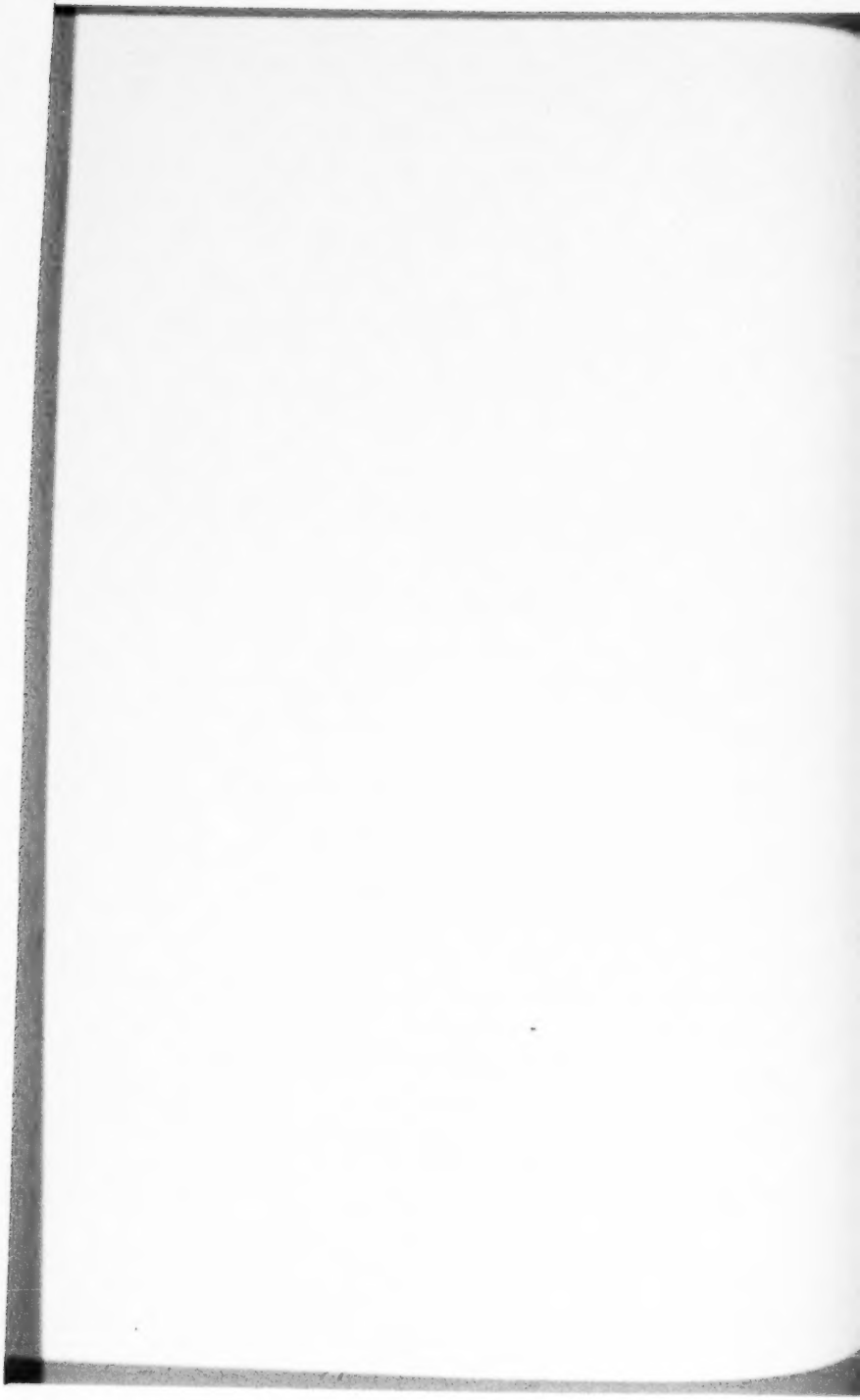

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1912
NO. 325

THE AMERICAN NATIONAL BANK
of Nashville, Tenn.
Plaintiff in Error

vs

A. L. MILLER, Agt., of FIRST NATIONAL BANK
of Macon, Ga.
Defendant in Error

In Error to the United States Circuit Court of Appeals
for the Sixth Circuit

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR

J. S. PILCHER,
JOHN M. GAUT,
Attorneys for Plaintiff in Error.

SUBJECT INDEX

LIST OF CASES.

IN THE

Supreme Court of the United States

THE AMERICAN NATIONAL BANK
OF NASHVILLE, TENN.,
PLAINTIFF IN ERROR,

VS

A. L. MILLER, AGENT, DEFENDANT IN ERROR

STATEMENT OF THE CASE.

This suit arises out of a situation existing, and transactions which took place, on May 14th, 1904, and some days thereafter. On that date, and for years prior thereto, R. H. Plant was, and had been, a citizen of Macon, Ga., and was supposed to be a man of great wealth; was carrying on a large and varied business in that city and elsewhere, said business being conducted in distinct separate departments. As part of his business he was conducting a private bank, unincorporated, in the city of Macon under the name of I. C. Plant's Sons' Bank. While he was

the sole owner of the bank, it had its cashier and was running as a regular bank, being a member of the Clearing House of that city.

The First National Bank of Macon, Ga., was a bank existing under the Acts of Congress, and of this institution Plant was a large stockholder, a director, its President, and its General Manager. The American National Bank, the plaintiff in error in this case, was located at Nashville, Tennessee. R. H. Plant was a regular depositor in that bank, and the bank from time to time discounted his paper. On May 14th, 1904, he had to his credit in the American National Bank more than $3,000.00, and it held his discounted paper to the extent of fifty thousand ($50,000.00) dollars

On the 14th of May, 1904, R. H. Plant was indebted to the First National Bank of Macon, Ga., largely more than $3,000.00, and on that date, it being Saturday, he drew a check for $3,000.00 and delivered it to the First National Bank in part payment of his indebtedness to it. The First National Bank forwarded this check to the American National Bank for deposit. The letter enclosing the check was received by the American National in the morning's mail on Monday, May 16, but was not acted on in any way until later in the day. Some time, not earlier than eleven o'clock a.m., the check passed to the general bookkeeper, who credited it to the First National Bank. In the afternoon of that day, after three o'clock, the check was charged to Plant's account, and some time about five o'clock or later a letter of

advice was mailed, informing the First National that the check had been credited to it.

It turned out that when Plant drew his check and delivered it he was hopelessly insolvent. His private bank was never opened again. On Monday, May 16th, about twenty minutes before nine o'clock, there was posted on the door of his banking house a notice that the bank was suspended and would not be opened. The First National Bank was in the same building with Plant's private bank, with a door opening between the two apartments which they respectively occupied. The Cashier of the First National Bank learned of the suspension of Plant's Private Bank a few minutes after nine o'clock.

At forty-five minutes past eleven o'clock a.m. of May 16, a petition in bankruptcy was filed in the District Court at Macon against Mr. Plant. His regular assets paid only about ten cents on the dollar. The check was not otherwise paid than by these book entries. At the time these entries were made and the letter of advice mailed, the American National Bank had no knowledge whatever of the state of notorious insolvency of Mr. Plant, nor of his suspension and bankruptcy, and did not learn of these facts until the next day. As soon as it did learn of them, it charged the First National Bank with the amount of the check and credited R. H. Plant's account and applied the $3,000.00 as a set-off on Plant's indebtedness to it, and by mail informed both Plant and the First Nationa lof its action and returned the check to the latter. The First National was found to

be insolvent and went into the hands of a receiver, and Miller, the defendant in error, brought this suit to recover that amount, which the American National Bank refused to pay. The National Banking Act authorizes the appointment of an agent only after the debts are paid.

On the trial of the case before the jury, the plaintiff read in evidence the stipulation which had been entered into and rested his case. The defendant then introduced proof to sustain its defense. At the close of the defendant's proof the plaintiff's counsel stated to the Court that they would like to ask, before they put in any proof in "rebuttal, for peremptory instruction, and that whatever proof in rebuttal was submitted for plaintiff would be subject to this motion." The Court stated that he "would hear the motion, but would not act on it, and that plaintiff might introduce his rebuttal testimony and he would act on the motion as of the time it was made." (Tr., 83.) Plaintiff then introduced his rebuttal testimony, when his counsel "renewed their motion for peremptory instructions." (Tr., 103.) The defendant then moved the Court for peremptory instructions to the jury, instructing them to find a verdict for the defendant. (Tr., 103.) Then the following took place: "Plaintiff's counsel moved the Court to take the case and consider it on the testimony. (Tr., 103.) It was then insisted by plaintiff's counsel that the two motions were tantamount to taking the case away from the jury or is a demurrer to the evidence. Plaintiff's counsel then stated that their motion was to direct a verdict in favor of the

plaintiff for $3,000.00, with interest from May 24th, 1904, the date the check was charged back." (Tr., 103.)

After argument of counsel, the Court decided that it was his duty "to find the facts and give the jury peremptory instructions as to the verdict which they shall return." (Tr., 104.) He then proceeded to make an elaborate finding of the facts, in several instances passing upon "the weight of the evidence," and continued by saying to the jury that "on these facts I charge you as a matter of law," etc., stating several propositions of law (p. 106), and concluded with an instruction to find a verdict for the plaintiff for $3,000.00, with interest from the bringing of the suit. The defendant moved the Court for a new trial, which motion was overruled. The defendant then took a writ of error from the Circuit Court of Appeals. This Court, passing on the facts, as found and "as supplemented by the stipulation of agreed facts and the undisputed evidence," affirmed the judgment.

Writ of error was then taken from this court.

BRIEF.

1. The American National Bank, at the time when it made the book entries and mailed the letter of advice, was in total ignorance of Plant's insolvency, suspension and bankruptcy. (Tr., 71, 80.)

2. Having acted under mistake of fact, that bank had the right, as between itself and Plant or any one

standing in his shoes, to revoke the book entries and make the set off.

Re Far. & Mechan. Bk., 13 Fed., 361.
Re Dickinson, 5 B. R., 483.
Un. Nat. Bk. v. McKay, 102 Fed., 662.
Kelley v. Solare, 9 Meeson & Welsby, 54.
Bell v. Gardner, 4 Man. & Gran., 10.
French v. DeBow, 38 Mich., 708.
Noble v. Doughten, 72 Kan., 336.

3. The American Bank also had the right, as between itself and the First National, to revoke the book entries on the ground of mistake. The latter bank, having given no value for the check, and suffered no injury by its reception, the equities of the former were superior.

Guild v. Baldridge, 2 Swan (Tenn.), 295.
Bank of Repub. v. Baxter, 31 Vermont, 101.
Cyc. of Law & Proceed., Vol. 5, 542b.
The check not payment, but only means of payment. (Tr.)

4. It was a wrong upon the American Bank for Plant, in his condition of insolvency, to have drawn and delivered the check, and especially wrong, after his act of notorious insolvency, not to have notified that bank of the fact.

Kerr on Fraud and Mistake, 109.
Mitchell v. Warden, 20 Barb., 253.
Pegulus v. Taylor, 38 Barb., 375.
Choffer v. Fort, 2 Lansing, 81.
Sharkey v. Mansfield, 90 N. Y., 227.

5. If the First National knew of his state of insolvency, and especially of either one of his notorious acts of insolvency, at any time before the contract and act of deposit was consummated, it was *particeps criminis* in not informing the American National of such insolvency.

> Peterson v. Un. Nat. Bk., 52 Penn., 206 (91 Amer. Dec., 146).

6. The First National, independent of any imputation to it of Plant's knowledge, did know of the notorious act or acts of insolvency before the contract of deposit was consummated.

> Check credited to First National not before 10:30 a.m.; probably not before 11 a.m. (Tr., 74 and 75.)
>
> Check not charged to Plant until after 3:30 p.m. (Tr., 75.)
>
> Letter of advice not mailed till after four o'clock p.m. (Tr., 75.)
>
> Notorious insolvency known to First National prior to 9 o'clock a.m. (Tr., 24, 25, 106 top.)
>
> The bankruptcy became known to it about the time it took place. Finding of the trial judge. (Tr., 106.)
>
> Contract of deposit not consummated till letter of advice mailed. Bank v. Yardley, 165 U. S., 646; Bank of Rep. v. Baxter, 31 Vermont, 101.

7. It was the duty of the First National to have

informed American National of the notorious insolvency and bankruptcy as soon as it learned of the same, that the latter might not further deal with Plant's check as the check of a solvent man, and this duty existed, whether it knew of Plant's indebtedness to the American Bank or not.

8. The First National, at the time it received the check, knew of this indebtedness of Plant to the American by the imputation of Plant's knowledge.

> St. Louis, etc. R. Co. v. Johnston, 133 U. S., 566.

9. This doctrine of imputation exists in all cases where the agent is acting within the scope of his authority.

> The doctrine does not rest on a presumption that the agent will communicate his information to his principal. This Court, in effect, so held in St. Louis, etc. v. Johnston, *supra*.

10. Plant, in accepting, for the First National, the check in question, was acting within the scope of his authority.

> Whether we consider the act of payment itself, or the results of the payment, his interests were not adverse to, but were concurrent with, those of the First National.
>
> If the interests had been conflicting, he was authorized by the action of the Board of Directors, acquiesced in by the stockholders, to control this particular kind of his in-

debtedness to the bank, increasing or diminishing it daily as he liked. (Tr., 24, Q. 214 and 215; p. 17, Q. 141 to p. 18, Q. 148.

11. Even if the doctrine of imputation did rest on the probability of the agent communicating his knowledge to his principal, there was no improbability that Plant would have communicated to the other officers of the bank, had there been any occasion to do so, the fact that he owed the American Bank $3,000.00 or even $50,000.00. Either sum was an inconsiderable sum compared with his reputed wealth. (Tr., p. 19, Q. 154 to 161.)

12. The trial judge was in error in directing a verdict for the plaintiff below. If we are correct in our contentions as to the law, there was no evidence whatever to support such a verdict.

13. The trial judge was in error in not instructing a verdict for defendant below.

14. If he was not in error in not directing a verdict for defendant, he should at least have submitted the case to the jury. The dual requests were not tantamount to an agreement that he should find the facts.

Beutell v. McGone, 157 U. S., 157.

Menehan v. Grand Trunk R. R., 70 C. C. A., 463; 138 Fed., 37.

ARGUMENT.

ASSIGNMENTS NOS. 1 AND 2.

The contentions in both of these assignments are based on the fact of mistake and its legal consequence. We will therefore discuss both together.

In these assignments plaintiff in error insists that inasmuch as the book entries made by the American National Bank were made in ignorance of the insolvency, suspension and bankruptcy of Plant, and hence in ignorance of its right of set off, they were made under mistake of fact, and that it had a right to ignore them and insist on the right of set off. That the right existed does not admit of question.

Nashville Trust Co. v. Bank, 91 Tenn., 336.

Georgia Seed Co. v. Talmage & Co., 96 Ga., 254, 259.

Carr. v. Hamilton, 129 U. S., 253.

Laclede Bank v. Craig, Assignee, 120 U. S., 511.

The Tennessee case involved a large amount. It was argued by J. M. Dickinson on one side and by J. C. McReynolds on the other. The opinion was by John A. Pitts as special judge, one of Tennessee's ablest lawyers, and was able and exhaustive. The Court held that the mere fact of insolvency gave rise to the right of set off, though the debt sought to be set off was not d[illegible]; that the right existed at law as well as in equity; that the asset which passed in that case from the bank to the assignee under the gen-

eral assignment, consisted only of the balance remaining due after deducting the debt of the bank. When insolvency or bankruptcy comes the law sets off the one debt against the other without any action on the part of the creditor. His debt is only what remains due to him after deducting the smaller debt which he owes to his debtor. Beyond this, the debt due him is paid by operation of law. If sued on the smaller debt he can maintain a plea of set off, notwithstanding he has prior to suit done no act implying an assertion of his right. On the other hand, when he proves his debt in the insolvency proceedings the law treats the debt due him as being only what remains after the set-off debt is deducted, though he may have taken no step to make the set off. The law does that. The question presented therefore is whether the American Bank repudiated this action of the law, and lost the privilege of asserting its rights thus conferred by the law, by the book entries in question made in absolute ignorance of the existence of those facts which put the law of set off in operation—in other words, in absolute ignorance of its legal rights.

The natural equities of this case are overwhelmingly with the American Bank. Its debt against Plant, on which it receives only about 10 or 11 cents on the dollar, amounted, without the set off, to $50,000, and with the $3,000 deducted, to $47,000. It was entitled to this deduction. On this subject the Supreme Court of Tennessee, the State under whose laws the rights of the American Bank arise, in the case cited above say:

> "And, first of all, it must be remembered that the doctrine of set off, whether legal or equitable, is essentially a doctrine of equity. It was that natural justice and equity which dictates that the demands of parties mutually indebted should be set off against each other, and only the balance recovered, that gave birth to the idea of accomplishing that result in a judicial proceeding. . . . The jurisdiction of courts of equity over the subject of set off was exercised before there was any statute upon the subject. . . . The natural equity to have mutual but unconnected demands between two parties who have been dealing with each other set off, is as a general rule superior to the claim of any other creditor who has not dealt with the insolvent upon the faith of the specific fund against which the right of set off is claimed."

This Court, in Carr v. Hamilton, 129 U. S., 253, say:

> "In pursuance of these old statutes and the dictates of equity, the principle of set off between mutual debts and credits has for nearly two centuries past been adopted in the English Bankruptcy Laws, and has always prevailed in our own whenever we have had such a law in force in our statute books; and it matters not whether the debt was due at the time of bankruptcy or not."

The court cites various cases, acts of Congress and treatises on bankruptcy.

The First National paid nothing for this check, but took it as a means of payment on a pre-existing debt. The American returned it, and claimed its

right of set off promptly. The First National had ample time to prove its whole debt against Plant's estate, and lost absolutely nothing by the transaction. If plaintiff is unsuccessful in this suit the Macon bank will be just where it was before it took the check. Its creditors are all paid in full. This suit is in behalf of its stockholders. These stockholders include some of Plant's relatives, he owning a large part of the stock himself. He was general manager of the bank, directed its financial policy, controlled its discounts and credits, and especially dictated what paper of his own should be received by the bank for either discount or credit. The trial court found that "he was the general manager of the affairs of the bank." (Tr., 108, 2d par.)

His clearing house balances were an illustration of the manner in which he controlled his own dealings with the bank. They constituted a daily shifting indebtedness to the bank, payments being made daily and new amounts being added to the indebtedness daily. This was not a mere daily overdraft, but an indebtedness bearing eight per cent interest, and evidenced by tickets carried as cash in the cash drawer. Plant thus controlled absolutely the loans which the bank made to himself and the payments made to the bank by himself. He borrowed when he pleased and in such amounts as he pleased and paid when and in such amounts as he pleased.

This course of dealing was objected to by Williams, the cashier, and the latter talked with two of the directors about it (Tr., 18) and finally resigned on

account of it, tendering his resignation to the board of directors. The directors sustained Plant and accepted Williams' resignation. Plant then put Findlay in as cashier, a mere clerk of Plant's, with an understanding that Plant should continue to control things as he had done in the past, and this in fact he did do. This course of dealing was of long continuance, was sanctioned by the directors and acquiesced in by the stockholders, and it is in the exclusive interest of these stockholders that this suit is being prosecuted. This relation between Plant and the bank alone furnishes abundant ground for contending, as we herein do contend, that when Plant paid this $3,000 to the bank on his debt for the clearing house balances, he was acting within the scope of his authority, and that any knowledge which he possessed bearing on the transaction must be imputed to the corporation, so that anything which the corporation subsequently did or failed to do was done or omitted with full knowledge.

But proceeding with the argument as to the effect of mistake, the principle of law is general that acts done under mistake of fact, and sometimes even under mistake of law, are not binding, and the party who is the victim of the mistake has the right to treat the acts as though they had never taken place. Why the principle should not be applicable to this case is not apparent. The Court of Appeals decided on this point as follows:

> "The transaction is thus complete, and cannot be rescinded except for fraud or in case of

mutual mistake. National Bank v. Burkhart, 100 U. S., 686, 689; Montgomery County v. Cochran (C. C. A., 5), 126 Fed., 456, 460; Riverside Bank v. National Bank (C. C. A., 2), 74 Fed., 276, 278, and cases there cited. If, therefore, the Circuit Court correctly held that the Macon National Bank was not bound by Plant's knowledge of his own insolvency and his indebtedness to the defendant bank, nor in default for not advising the defendant bank of Plant's embarrassed condition at the time it became known to the officers of the Macon National Bank, who were then in personal charge of its affairs, it is evident that the plaintiff was entitled to a direction of the verdict in its favor. The doctrine of mutual mistake does not apply." (Tr., 144.)

There would seem to be no escape from the dilemma, that either the First National had no knowledge of the suspension, insolvency and bankruptcy of Plant before the book entries were made and the letter of advice mailed, in which case the mistake was mutual, or it did have knowledge of these events within the time stated, and the transaction was, so far as it was concerned, tainted with bad faith. But we think that mutuality of the mistake is not necessary to entitle the innocent victim of the mistake to relief. The fact that one party to the transaction is not laboring under any mistake, but with knowledge of undisclosed material facts of which the other party is ignorant, we think, only intensifies the right of the other party to relief on the ground of mistake. We therefore think that the right to relief on the ground of mistake is not confined to cases of mutual mistake.

It will be seen that the Court of Appeals first recognizes cases of mutual mistake as ones in which relief can be granted, and then declares that the doctrine of mutual mistake has no application to this case if both parties were ignorant of the facts in question. The Court cites National Bank v. Burkhart, 100 U. S., 686, 689; Montgomery County v. Cochran, C. C. A., 5 (126 Fed., 456, 460); Riverside Bank v. National Bank, C. C. A., 2 (74 Fed., 267, 278), and cases there cited. Neither one of these three cases involved any question of fraud or mistake, mutual or otherwise.

The case of National Bank v. Burkhart, 100 U. S., 686, was one in which a party had guaranteed the payment to a bank of any paper, to the extent of $50,000.00 of a third party, of which it might thereafter become a holder. The person guaranteed drew a check on the bank for a large amount and delivered it to a third party, a customer of the bank. This customer presented the check for deposit to the bank, and the question was whether the deposit was unconditionally accepted at the hour presented or whether it was only accepted subject to examination. If unconditionally accepted it was not within the guarantee. This was the sole question in the case. The jury had in effect found that it was unconditionally accepted. The Court then simply states the general unquestioned proposition that when a check is presented to a bank for deposit and the bank accepts it, crediting the depositor and charging the drawer, the check is paid and the bank becomes debtor to the depositor. The Court adds, on page 689, such a con-

tract so entered into is binding upon both parties, "there being no fraud." We think it is evident that the Court simply meant that such a contract is binding unless there be some equitable ground to set it aside, and happens to mention fraud as such a ground. Certainly the Court was not undertaking to enumerate all the equitable grounds which would avoid the contract, there being no question of the kind in the case.

The case of Montgomery County v. Cochran (C. C. A., 5), 126 Fed., 456, 460, was a case in which a County Treasurer had received a check for a large amount and deposited in an insolvent bank, the law forbidding a deposit in any bank. He and his surety were sued on his bond. The defendants claimed that the treasurer had never collected the money. The Court held, however, that as the treasurer had presented the check to the bank for deposit and it had been entered to his credit and charged to the drawer and the treasurer had charged himself with the amount of it on his books, he had in substance collected and deposited the money and the bond had been breached. There was no question of fraud or mistake in the case.

The case of Riverside Bank v. National Bank (C. C. A., 2), 74 Fed., 267, 278, was one in which the bank had certified a note payable at that bank, believing that the maker's account was sufficient to meet it, a note so payable being in legal effect a check. Finding that the account of the maker was insufficient to pay the note, the bank undertook to rescind the transac-

tion. Of course, the court held that the bank could not do so, stating that the defendant had "agreed to pay the amount, and the contract can no more be rescinded than any other contract." It is well settled law that if a bank, having the means of ascertaining from its own books the state of the account of any one of its customers, sees fit to pay his check without examining the account, it is guilty of negligence and pays at its peril so far as third parties are concerned. The Court states the general rule that a party paying money under mistake may recover it back, but states that there are two exceptions to the rule, and then states the exceptions to be cases where there is a mistake as to the signature of the drawer of the check or a mistake as to the state of his account, and that in this case the action of the bank is conclusive between the holder and the drawee. In that case it further appeared that the depositor had lost his opportunity for recourse on an indorser or maker.

We think that both reason and authority establish the proposition that the victim of the mistake is entitled to relief, whether his adversary was acting under the same mistake or not. That the American National Bank was acting under a mistake is not questioned, nor questionable.

The alleged payment was not only a *mere paper* payment, but was not complete until the *letter of advice* was mailed, which was at least as late as four o'clock p.m., May 16. Insolvency existed long prior to May 16, suspension took place as early as nine a.m., May 16 (Tr. p. 24, Q. 222), and the bankruptcy

as early as 11:45 a.m. of that day. (Tr. p. 3, Sec VI). The American National, through the entire day of May 16 and longer, was ignorant of the facts of insolvency, suspension and bankruptcy, and hence ignorant of its rights. It supposed Plant to be solvent and to be going on in business as usual.(Tr. pp. 71-80.) All these facts are not only proven by uncontradicted testimony, but all of them were found by the court. (Tr., pp. 105, 106.)

The cases are numerous where parties paying money, releasing liens or parting with other valuable rights, including the right to set off, under a mistake have been permitted to reclaim the money for the purpose of availing themselves of the set off or to assert the other legal right.

In the case *re* Far. & Mech. Bank of Rochester, 13 Fed, 361, Roberts, a depositor, had to his credit in the bank $650.00. The bank held a note against him for $500.00. He went into bankruptcy. The bank, forgetting that it held the note, paid the amount of the deposit to the assignee in bankruptcy. The bank had been advised that it could not set off the note against the deposit, but the Court held that the mistake as to his legal right entitled him to recover the money. The action was, in a court of law for money had and received.

The case *re* Dickinson, 5 Bankrupt Rep., 483, involved the following facts:

> Nayor & Dickinson made a general assignment. Subsequently, on the same day, they drew

their check for their bank balance in favor of the assignee. The bank, without knowledge of the assignment, took up the check by its due bill to the assignee. Soon afterwards the assignee informed the bank of the assignment and the bank demanded a return of the due bill and claimed the right of set-off. It was agreed that the assignee should hold the fund subject to the decision of some competent court. The check was for $9,012.97, and the debt due the bank was $40,000.00. After this the firm was adjudged bankrupt, and the fund was turned over to the trustee. The bank insisted that its right of set-off had not been impaired by the giving of the due bill, because it had been given in ignorance of the assignment. The Court so held. The Court says that this ignorance deprived the bank of the opportunity to decline recognition of the title of the assignee and to hold the fund for distribution or disposition in a bankrupt court which would take jurisdiction of the fund upon proof that the assignment had been made. The bank had a right to know and to select its own course of action and self-protection. The Court further says if it, the bank, had known "the Court would not seek to undo what it (the bank) had openly done consciously and pursuant to law." Surely the book entries in our case are not more effective than the giving of the due bill in the above cited case.

Another case was Union National Bank v. McKay, 102 Fed., 662. This was also a case in which the bank had paid over the deposit to a nassignee in bankruptcy, forgetting that it held a debt against the bankrupt. The Court held this forgetfulness to be

in law a mistake, and decreed the repayment of the money.

The Tennessee court, in Guild v. Baldridge, 2 Swan, 295, reviewed the case of Kelly v. Solare, 9 Meeson and Welsby, 54, where an insurance company had paid a lapsed insurance policy, having forgotten the fact that the policy had been marked lapsed for non-payment of premium. In that case the Court says:

> "I think that where money is paid to another, under the influence of a mistake—that is, upon the supposition that a specific fact is true, which would entitle the other to the money, but which fact is untrue, and the money would not have been paid if it had been known to the payor that the fact was untrue—an action will lie to recover it back and it is against conscience to retain it." (P. 299.)

The case of Bell v. Gardner, 4 Man. G. 10, is quoted from in the Tennessee case. The mistake was in taking up as endorser a dishonored bill of exchange after the endorser had been, in law, released from his liability on it by a material alteration of it. The endorser was ignorant of the alteration when he took it up. The Court in that case said:

> "Where a payment has been made, not with full knowledge of the facts, but only under a blind suspicion of the case, and it is found to have been paid unjustly, the party paying may recover it back again."

In the case of French v. DeBow, 38 Michigan, 708,

a mortgagee released the lien of his mortgage on lands in consideration of an absolute conveyance to him of a part of the lands covered by the mortgage. When he accepted this conveyance he supposed the lands to be entirely unencumbered except by his own mortgage. It turned out, however, that the mortgagor had put an encumbrance on the lands subsequent to the mortgage and prior to the conveyance. The result was the mortgagee had released his mortgage lien for a supposed valuable consideration, but really without consideration, the title to the lands conveyed to him being invalid. He brought suit to have his mortgage lien reinstated, and the court reinstated it on the ground that it had been released under mistake of fact. What difference in principle can there be between the release of a mortgage lien under mistake of fact and the failure, due to mistake of fact, to exercise a right of set-off?

Noble v. Doughten, 72 Kan., 336, also involved the question of mistake. A check had been endorsed by the payee to a third party. Through the negligence of this endorsee the check was not presented with the promptness which the law required, and before it was presented the bank failed. The endorser, knowing that payment had been refused, and ignorant of the holder's negligence, took it up with his check on another bank. The Court held that the endorser, having paid or taken up the first check in ignorance of the holder's (the endorsee's) negligence could, on the ground of mistake, recover back the money.

Had the bank paid this money to Mr. Plant, it

could have recovered it back. He knew that he was insolvent. He knew that the bank held a large debt against him. He is conclusively presumed to know that the right of set-off existed. It was a wrong for him to have drawn a check under the circumstances. After he had suspended business as an insolvent, and especially after he had gone into bankruptcy, it was his duty to have notified the bank of his situation.

> "When a person has *committed a notorious act of insolvency* it is fraud not to communicate the fact to those with whom he has previously dealt." Mitchel vs. Warden, 20 Barbour, 253; Peguino v. Taylor, 38 Barbour, 375; Chaffer v. Fort, 2 Lansing, 81; Kerr on Fraud and Mistake, 109."

The same principle is involved when a depositor draws a check, knowing that he has no funds with which to meet it and no reasonable prospect of its being met, or ~~getting~~ a check certified when he is insolvent.

In the case of the Standard Oil Co. v. Hawkins, 74 Fed. Rep., 395, a party deposited money in a bank which was insolvent, but its insolvency was not known to him. The bank was put into the hands of a receiver and the depositor proved his debt in the liquidation proceeding. Afterwards, upon taking legal advice, he found that he was entitled to recover the deposit. He declined his dividend and asked leave to withdraw his proof of claim. He filed a bill asking to be permitted to "re-use" his election of remedies made under mistake of law and to recover from the receiver the full amount of the deposit. The

United States Court of Appeals decreed that he had the right to do so.

In the case of Peterson v. Union National Bank, 52 Pa., 206 (91 American Decisions), 146), in which Judge Strong delivered the opinion, the Court say:

> "That the check of Stanford & Houston was not actually paid is a conceded fact. No more is claimed than that the bank paid it in legal effect by charging it to the drawer and crediting its amount to the plaintiffs. But what of that? Surely it needs no argument to prove that the plaintiffs can retain no credit by their fraud. The drawing of a check upon a bank in which the drawer has no funds and uttering it is a fraud. It amounts to a false affirmation that the money is there to meet it. Hence it is a deceit practiced upon any person to whom the check may be negotiated and equally upon the bank upon which it may be drawn. It is manifestly impossible for the officers of a bank to keep ever in memory the state of each depositor's account. To a certain extent confidence is reposed in the depositor that he will not present for payment a check which he has not provided funds to meet and the abuse of that confidence is dishonest. It is not easy to see how it is less dishonest in *the holder of the check drawn by another party*, to present it for payment, when he knows the drawer has no funds in bank to meet it. His knowledge makes him a party to the fraud of the drawer, and he becomes a willing assistant therein." (P. 206.)

A case similar in principle is that of Starkey v. Mansfield, in 30 N. Y., 227. The party had paid for

work done, mistaking the quantity of it, and receiver of the money knowing it was an overpayment. The Court said that if the payee "did not perpetrate a fraud, at least he committed a wrong." (P. 230.)

The Court of Appeals conceded for the purposes of the suit that as against Plant and any one standing in his shoes, the American Bank was entitled to relief. (Tr., 142.)

This doctrine applies to cases where the money has been paid to third parties as well as to cases where it is paid to the drawer or maker of the paper. The only difference is this: If the thirty party is an innocent holder for value or has been put in any worse condition because of the payment than he was in before the payment was made, he can retain the money.

In the case of Guild v. Baldridge, 2 Swan (Tenn.), 295, a party who had been indebted to another, but had paid the debt, paid it a second time to a creditor of his supposed creditor under a judgment and garnishment process. When he made the second payment he expressed his belief that he had previously paid the debt, but could find no receipt. Some time after the second payment he found a receipt in full for the debt, and sued the creditor of his supposed creditor to recover back the money paid the second time. The Court held that the payment having been made under a mistake of facts, he was entitled to recover. The reasoning of the case is so satisfactory that we invite the Court to the reading of the whole opinion. It will be noticed that the payment was

made in cash, not as in our case, by mere book entries. The plaintiff had previously known of the fact of which he was ignorant when he made the payment. But the American National Bank had never known of Plant's insolvency or bankruptcy, and had never had the means of knowing it. In that case the party to whom payment was made was entirely innocent, and, as in this case, the payment had been made on a pre-existing debt.

This case is the same in principle as that one. In the latter the party, under mistake, parted with his money; in this the American National Bank parted, as is alleged, with its right of set-off, which is substantially the same thing as money—it pays debts.

In Guild v. Baldridge, the Court draws the distinction between cases where payment has been made to an innocent third party who has parted with value and those in which he has not. The Court say:

> "Take the case of a payment, without knowledge of the facts, made, not to the original creditor of the party paying, whose debt had been previously satisfied, but to a creditor of his who received the money in good faith, ignorant of the mistake, and in satisfaction of a just demand, and who, in consequence of such payment, may have waived or lost his remedy against his debtor. In such case it is clear, upon well-established principles, that the plaintiff would not be entitled to recover. The defendant, in the given case, would be equally innocent, as the plaintiff, of the mistake; and having lost his remedy upon the faith of such payment, it would not be

against conscience for him to retain the money, and the loss must fall upon the plaintiff, by whose act, though innocently done, it was occasioned. But when no such injury would necessarily result, it is wholly immaterial, as respects the plaintiff's right of recovery, whether the payment by mistake was to the person whose debt had been previously discharged, or to a third person claiming to be a creditor of his. The plaintiff's right is precisely the same as against either, in the absence of some such peculiar equity as is supposed to exist in the foregoing case."

The First National Bank parted with nothing of value on the strength of the check. The receiver was promptly notified that the check had been charged back and would not be paid and that the set-off would be claimed. He had ample time and opportunity to have proved his debt against Plant's estate, and it must be presumed that he did so. Under the laws of Georgia, a check is presumed not to be taken in extinguishment of a debt. (Tr., 63.) Weaver v. Nixon and Webster, 69 Ga., 699-702. Code of Ga., Sec. 3720. Tr., 6

The same doctrine as to payments to innocent third parties is announced in Bank of Republic v. Baxter, 31 Vermont, 101. A depositor drew, and procured the bank, on the representation of his solvency, to certify a check for $7,350.00, and delivered it to another bank for the use of his creditor in payment of his debt. The drawer proved to be hopelessly insolvent. The bank was ignorant of this fact when the check was certified. The Court say:

> "It is not claimed that he (the creditor) ever performed any act, or failed to perform any, or ever parted with any consideration, or yielded any right or advantage on the credit of this fund. * * * Upon this comparison of the respective rights of these two claimants of this fund, we think there can be but one opinion, that is, that the orator's right, not only in natural and substantial justice, but in law and equity, is quite superior to that of H. H. Baxter (the creditor)."

The Cyclopedea of Law and Procedure (C. Y. C.), Vol 5, page 542b, undertaking to state the established law on this subject, says:

> "When payment is made to the holder of paper, who has come into possession of it without any fault on his part, and his situation would be rendered worse if compelled to refund than it was before he received payment, the money cannot be recovered from him. If, however, he has been negligent in any regard, he cannot retain the money. To justify him in doing so, the bank alone must be negligent. If neither party has been negligent, or both have been, then the bank can recover the money."

It will be seen that even if the party receiving the money has been put in worse condition, yet if he has been negligent, he may be compelled to return it on the ground of mistake, even though the other party has been negligent also. The equity in favor of the payor is greater than that of the payee, where the payee alone is negligent or even where both are negligent.

The digester cites a large number of English and American cases in support of the text.

ASSIGNMENTS OF ERROR NOS. 3, 3A, 3B, 3C AND 3D.

All five of these assignments of error involve or lead up to the general question as to whether Plant's knowledge was imputable to the First National Bank. They will therefore be argued together, proper reference being made, in the course of the argument, to each of the sub-assignments.

It was, of course, wrong for Mr. Plant to have drawn and delivered this check. He knew he was insolvent. It can hardly be doubted that he realized himself to be in a desperate condition at the time the check was drawn and delivered. It was drawn on Saturday. On that day his bank closed forever. By 11:45 on Monday he was in a court of bankruptcy. Preparations for bankruptcy must have been made on Sunday. He knew that he owed the American Bank a debt of $50,000.00. He is conclusively presumed to know that the bank had a right under the existing circumstances to off set his deposit balance against this indebtedness. As heretofore stated, it is the law that "when a person has committed a notorious act of insolvency it is a fraud not to communicate the fact to those with whom he had previously dealt. Mitchell v. Warden, 20 Barbour 253; Pegulno v. Taylor, 38 Barb., 375; Chaffer v. Fort, 2 Lansing, 81; Kerr on Fraud & Mistake, 109.

He not only did not notify the bank of his condition, but attempted to deprive the bank of its valuable

right of set off to the extent of the $3,000.00. He attempted a serious wrong. It was a wrong of the same character as to draw, and attempt to have collected, a check when the drawer has no funds with which to meet it and no reasonable prospect of having any; or to get a check certified as good when the drawer is insolvent.

If the First National knew of his insolvency, either when it received the check or at any time before the contract of deposit was consummated, that bank was *particeps criminis*. Suppose the First National had, through one of its agents, made its deposit in person, and after it had handed in the check and before the check had been accepted by the teller and entered upon its deposit book, it had acquired guilty knowledge, of course it would have been morally and legally bound to have communicated the information and would have been guilty of fraudulently suppressing facts had it allowed the contract and act of deposit to be consummated without disclosure. This deposit was not made in person but by mail. As said by this Court in 100 U. S., 689, such a transaction consists of an offer to deposit and an acceptance of the offer. No contract made by correspondence is a contract until the offer of one party is accepted by the other by a deposit of the letter of acceptance in the mail. Bank v. Yardly, 165 N., 646. This rule applies to contracts of bank deposit. Bk. of Rep. v. Baxter, 31 Vermont, 101. The offer in this case was made by the letter of the First National. It was not accepted until the American deposited its letter of advice in the United States mail. This is the universal law in

regard to contracts entered into through correspondence except that some of the states hold that the contract is not consummated until the letter is actually received by the party making the offer.

Before this acceptance and even before any of the book entries were made by the American Bank, every officer of the First National knew that Plant had, in the language of the decisions, "committed a notorious act of insolvency." There is no necessity for resorting to Plant's imputed knowledge as to this.

At 11:45 a.m. he was in the bankrupt court, and the finding of the court and the proof show that the bank officers learned of this bankruptcy about the time it occurred. Of course, they all knew it before the letter of advice was mailed, so that as to everything except Plant's indebtedness to the American Bank, the First National is charged with full information, while the deposit contract and the making of the deposit were still *in fieri* independent of any imputed knowledge. The proof shows that the check was not credited to the First National until as late as 10:30 and probably 11:00 o'clock. (Tr., 75.) It was not charged to Plant until after 3:30 p.m. (Tr., 75.) The letter of advice was not mailed until after 4:00 p.m. (Tr., 75.) The witnesses who prove these facts were by both parties, and hence there was no conflict.

We insist that it was immaterial whether or not the First National knew of Plant's indebtedness to the American Bank. He had committed a notorious act of insolvency, and it was his duty to have com-

municated the fact to those with whom he had previously dealt. The First National being informed of this notorious act of insolvency as early as nine o'clock in the morning and being engaged in the process of making a deposit of the check, was charged with the same duty that Plant was charged with, of communicatng to the Amercan Bank the fact of this notorious insolvency. The same is true as to the bankruptcy, as soon as the First National acquired information of it. Judge Strong, in the case of Peterson v. Union National Bank, 52 Penn., said, when speaking of the deposit of a check of an insolvent with knowledge, says, "it is not easy to see how it is less dishonest in the holder of a check . . . when he knows the drawer has no funds to meet it." So we think its knowledge of Plant's indebtedness was immaterial so far as the result in this case is concerned. The American Bank had, in the language of *re* Dickinson, 5 B. R., 593, a right to full information that it might elect what course it should take for self-protection.

We insist that Plant's relation to the First National was such that his knowledge was imputable. The Court found that Plant "was a large stockholder and president of the First National Bank and controlled its policy and management, and that it was a general custom in the bank to accept and discount any paper that he might send to them and to credit upon his account any paper that he might send for the purposes of credits." (Tr., 104.) The Court also found that he was "General Manager of the affairs of the bank." (Tr., 108.) The full scope of the

Court's language is made more clear by the undisputed proof to which we now call the Court's attention.

Findlay, the so-called cashier, makes the following statement of his agreement when he took his position:

> "Q. 213. Did you control the discounts *and papers taken in* the First National Bank as cashier, or was that under the direction of Mr. Plant?
>
> A. Mr. Plant had charge of that—when I went over there he told me that he wanted me to do practically nothing for a while until I could familiarize myself with things and the customs of the bank, and then, as he expressed it, he said, you and I together will look after the discounts, they were left to him, really I didn't know the custom of the bank, with the exception of a few small minor loans, I didn't pass on any of those things except under his direction." (Tr., 23; Q. 213.)

Mr. Findley testifies that up to the time of the bank's failure he had not learned the customers of the bank. (Tr., p. 24; Q. 213.) (We think the word "customs" in his testimony is a misprint for "customers.")

Again, in his deposition taken by Defendant in Error, he testifies as follows:

> "Q. During the period of his illness the papers were in fact brought in by Charlie Hurt, were not they?

A. Yes, sir; and before his illness the papers that were discounted there were usually brought in by Mr. Hurt—sometimes I think Mr. Plant would bring them in himself, but in regard to instructions, I would like to state this, that when I went over there, there were just general instructions, or perhaps you might say understanding there, that any papers that Hurt would bring in for *credit* or discount would be accepted." (Tr., 89.)

Thus he shows that he means by the words "discounts and papers taken in" (Tr., 23; Q. 213) in his first deposition, the same thing as by papers "brought in for credit or discount" in his second deposition. (P. 89, last Q.) That he meant to include paper sent for payment on Plant's indebtedness is made clear on page 24, Ques. 214, as follows:

"Q. 214. The indebtedness of Mr. Plant to the First National Bank, was it controlled by him or by you?

A. It was controlled by him."

Mr. Stallings, the bookkeeper, testified as follows:

"Q. 17. Mr. Stallings, in the conduct of the business of the First National Bank, was the business run by a finance or executive committee, or was it operated by Mr. Plant himself for the most part? In other words, *who was the managing head and director of that bank?*

A. Mr. R. H. Plant.

Q. 18. Did any committee of the directors look after the discounts *and pass upon the paper*

taken in day by day, or was that done under the direction of Mr. Plant?

A. Why, it was under the direction of Mr. Plant." (Tr., Q. 17 and 18.)

As to the handling of Mr. Plant's own paper by the bank, Mr. Stallings, the bookkeeper (Tr., p. 6; Q. Nos. 23 and 24) testified as follows:

"Q. 23. You were familiar with the general workings of that bank from day to day, were you; you were there and saw what went on?

A. Yes, sir.

Q. 24. Such paper of Mr. Plant's own that he turned over to the bank *for credit or discount* was accepted?

A. Yes, sir."

Mr. Findley says that, under the arrangement,

"Anything Mr. Hurt would bring in for I. C. Plant's Sons was accepted."

"Q. So that anything *Mr. Plant* sent in there was accepted by you for the First National Bank *without any question?*

A. *Yes, sir.*" (Tr., p. 89; first ques.)

As a matter of fact, Plant was the only person who had anything to do with the acceptance of this check for the First National. Findley, the cashier, testifies:

"Q. 227. You don't know whether Mr. Plant got the cash on that check or not?

A. No, I do not.

Q. 227. You don't know how he used the check?

A. I just know such a check was taken in that day, but I don't know whether it was placed to his credit or whether it was cashed for him, or whether it was credited on Plant's Son's clearing house balance. I merely know that such a check was handled there.

Q. 228. The First National Bank of Macon sent that check to the American National Bank of Nashville, they sent that in on the 13th to the Nashville bank?

A. Yes, sir; I presume so; *I didn't handle that personally."* (Tr., 35; Q. 226 to 228.)

Again Findley says:

"Q. Who handled the particular transaction of sending this draft on to Nashville?

A. That I *don't know.* I think that the draft in question was brought in *by Mr. Hurt,* together with a number of other papers, and turned over *either* to the *teller* or to the *bookkeeper to be credited* on the clearing house balance, I think, of *I. C. Plant's Son."* (Tr., 85, Q. 5.)

Stallings, the bookkeeper, says:

"Q. Do you recollect who handled the $3,000 transaction with the American National Bank of Nashville?

A. The entries were made *by myself.*

Q. Do you know who forwarded the draft?

A. You mean who actually inclosed it?

Q. Well, gave directions about it, for instance?

A. The direction of the draft was made when *I charged it up,* when I made the entries for it, *that settled* the course the draft was to take." (Tr., 96, Q. 2.)

Geo. H. Plant, brother of R. H. Plant, who was assisting Mr. Findley while R. H. was sick, was questioned as to who handled the particular transaction, and does not profess to have had anything to do with it. (Tr., 92.)

The stipulation says Plant drew the check and sent it to the bank, and sent it for the purpose of a payment to his clearing-house debt to the bank. Under his relation to the bank and his recognized powers the mere sending to the bank for that purpose was *ipso facto* an acceptance of it for the bank, and the act was so treated by the employes of the bank.

Thus it is made clear that Plant had long controlled his own indebtedness to the bank, that Williams raised an issue with him as to his right to control his indebtedness for the clearing house balances and talked with two of the directors about it, and then tendered his resignation to the board of directors and they sustained Plant and accepted Williams' resignation (Tr., 18); that Plant emlpoyed Findley with the distinct understanding that he (Plant) alone should control all discounts and credits, and, what is most pertinent in this case, his own indebtedness to the bank; and that Plant did actually so control these things, and this whole course of business was sanc-

tioned by the directors and not objected to but acquiesced in by the stockholders, the only persons pecuniarily interested in this suit.

It being true that R. H. Plant acted for the First National in the reception of this check, his knowledge was imputable. But the Court of Appeals was of opinion that the case presents an exception to this rule.

After stating the general rule, the opinion enumerates as an exception a case where the agent is engaged in attempt to defraud the principal in the transaction in question. No one contends that that is applicable to this case. Plant was attempting to pay the bank $3,000, and for the double reason that he thereby paid his own debt and the further reason that it was important that it should be paid at this particular time to prepare the bank for examination. There was no element of fraud whatever in his motives or in his act. Another exception stated by the Court is instances in which the agent has an interest adverse to his principal in the particular transaction in question. This we think can hardly be called an exception to the rule. In short, we think that the law on this subject is, that whenever the agent is acting within the scope of his authority, his knowledge of facts bearing upon the transaction are imputed to the principal. When his interests are adverse to the principal, he is not acting within the scope of his authority, because he has no authority in such a case, unless it be expressly given by the principal, to act for both the principal and himself. In such a case, therefore, the

agent is acting outside of the scope of his authority, and hence knowledge cannot be imputed. Although it has been sometimes stated that the reason why the law will not impute the agent's knowledge where the interests are adverse is because it is not presumable that the agent would communicate his knowledge to his principal, we do not believe that this is the true basis of the doctrine. When the agent is authorized to do the act in question, there is no occasion whatever for him to communicate with, or impart information to, his principal. Were proof offered to show that he did or did not so communicate, it would be irrelevant. And any presumption relied on, in lieu of proof, is equally irrelevant. Adversity of interest cuts no figure, except as it bears upon the question of the authority of the agent. The Court in the opinion states the general rule that, "The Principal is held to know all that his agent knows in any transaction in which the agent acts for him." (Tr., 145.) He then quotes from Judge Taft in Thompson-Houston Elec. Co. v. Capital Elec. Co., as follows:

> "This rule is said to be based on the principle of law that it is the agent's duty to communicate to his principal the knowledge which he has respecting the subject matter of negotiation, and the presumption that he will perform that duty." (Tr., 145.)

We think the words, "This rule *is said* to be based" indicate that Judge Taft himself was unwilling to sanction this basis of the principle of law. What he says is quoted by him from some one else.

We think, with all deference to the opinion of the learned Court, that it was fatally an error in assuming that,

> "The interest of one dealing with the principal on his own business is adverse to the interest of the principal, and the presumption in such case is that he will not disclose anything detrimental to his own interest." (Tr., 145.)

We do not think it is correct to say that the agent's interest is adverse in all cases where he acts for both. The interests were not adverse in this case, and in many other cases. The Court in effect holds that in this case the interest of Plant and the bank, in making this payment, were not adverse but concurrent. The Courts say:

> "It appears that on May 13th a national bank examiner was in the city of Macon examining another bank, and that on the 14th the examination of the First National Bank of Macon was begun. It is argued from this fact that Plant was acting solely in the interest of the bank in adjusting the clearing house balance referred to. There is no direct evidence that Plant in adjusting this balance was acting in the interest of the bank. On the other hand, it is manifact that he was at least equally interested in protecting himself, and was at least equally acting in his own interest in the trasnaction in question. He was interested not only as president and a large stockholder in the Macon National Bank, but also as the sole owner of the private bank and as a heavy borrower from the Macon National Bank, being upon paper held by that bank to the amount of over $500,000, nearly all

by way of endorsement for various corporations with which he was actively connected and which he financed. All the interests mentioned would naturally be seriously injured by the failure of the Macon National Bank, and were thus all interested in Plant's ability to adjust the large clearing house balance due from Plant's private bank. Over $2,000,000 of claims were proven against Plant's estate, largely on account of his endorsement upon paper of corporations which he represented. These conditions make it practically certain that Plant would not have disclosed to the First National Bank of Macon his own insolvency or the fact that his deposit account in the defendant bank was subject to be set off against a large indebtedness on his part to that bank. There is in this case no room for the application of the rule that the principal receiving the benefit cannot at the same time repudiate the agency, because of the adversary relation here existing and the fact that Plant was not even apparently acting solely in the interest of the bank." (Tr., 145-6.)

From this statement of the facts the Court makes it clear that it was to the concurrent interest of Plant and the bank that this payment should be made, and there was nothing contrary to good morals or law in Plant's acting for both. He was, therefore, acting within the scope of his authority.

But if it had been true that their interests were adverse, it is abundantly shown by the uncontradicted testimony of witnesses, who were the witnesses of both the plaintiff and the defendant, that Plant had for a long period of time been controlling the very

indebtedness on which this payment was made; that is to say, that he had been making daily payments on the indebtedness and making daily additions to it; that his right to do this had been challenged by Williams, cashier of the First National, and the issue brought to the attention of two members of the Board of Directors, and finally brought before the Board by the tender of Williams' resignation because of Plant's control of this indebtedness; and that the Board sustained Plant in his contention for the right to control this indebtedness; and that he continued to do so down to the very day when this check was delivered, and did it in the very delivering of the check; and that his right to thus control his indebtedness to the bank, and particularly this indebtedness, was sanctioned by the directors, and was never questioned by any stockholder, but was acquiesced in. If, therefore, there had been any adversity of interest between him and the bank, he was nevertheless authorized by the directors and stockholders to make this payment, and being authorized, whatever knowledge he had at the time it was made is held to be the knowledge of the principal, regardless of the question as to whether he did in fact communicate this knowledge to his principal, or would have done so, any presumption as to whether he did or did not being immaterial.

The Court say:

> "Nor is the agent's knowledge that of the principal when the interest or conduct of the agent is such as to make it certain he would not

disclose his knowledge to his principal." (Tr., 145.)

In support of this the Court cited Overton v. Thompson (C. C. A., 8), 118 Fed., 798, 800, 801. In that case the president of a bank and another owned a lot of cattle. The president of the bank sold them, received the proceeds, and deposited them in the bank in his own name, and checked them out, and used them for his own benefit. The other joint owner sued to hold the bank liable for its president's breach of trust in converting the funds to his own use by depositing them in his own name, and subsequently checking them out and using them for his own purposes. It was not contended that the bank had notice of the trust character of the deposit except by the imputation of the knowledge of the president. Of course the Court held that the knowledge could not be imputed. The president was engaged in the perpetration of a wrong upon his partner, and the bank also.

The Court, in support of the assumption that the interest of the agent and principal are necessarily adverse if the agent is acting for both, cited Levy v. Kauffman (C. C. A., 5), 114 Fed., 170-176-177. In this case the firm of Weil & Co. were in a failing condition. The president of a corporation was an uncle of one member of the firm, and Kauffman was a kinsman of another member. They agreed that each would furnish $15,000.00 to relieve the firm's embarrassment. In fulfillment of this *individual* obligation of the president, he caused the corporation to discount acceptances of the firm to the amount

of $15,000. It will be seen that this was, in effect, a case of the president obtaining a loan from the corporation. Of course his interests were adverse, and in acting for the corporation he acted without authority.

In support of the proposition that if the transaction is partly for the benefit of the agent, although the latter is representing, but not exclusively, the principal, there is no presumption that his information derogatory to his own right to transact such business will be communicated to his principal. The Courts cite the above mentioned case of Levy v. Kauffman, and also Louisville Trust Co. v. Railroad Co. (C. C. A. 6, 75 Fed., 433 and 469.) This was a case where the Court held, as stated in the syllabus, that

> "A bank whose president has knowledge of a defect in a guaranty on negotiable bonds at the time that it, acting through him, makes a loan thereon, is not charged with notice, he being part owner in the bonds, and the loan being in part for his benefit."

We think that all of these authorities sustain our contention, that adversity of interest in the paricular transaction which renders the act outside of the scope of the agent's authority, is the true ground on which the general rule of imputation does not apply, and that the rule does not rest to any extent on any presumption that the agent will not communicate his information to his principal. The decisions cited by the Court of Appeals do not, in our opinion, sustain

this doctrine of presumption, and the contention is in conflict with the case of St. Louis, etc., R. R. Co. v. Johnston, 133 U. S., 566; 33 L. Ed., 683. In that case a deposit of a large check was made in a bank hopelessly insolvent. The Court held that if the corporation knew of its insolvency it was a fraud on the depositor to have received the deposit without disclosing its insolvency. What made the bank insolvent was that the firm of which the President of the bank was a member had largely overdrawn its account in the bank and was insolvent. The firm being insolvent, made the bank insolvent. The Court held, citing other United States cases, that the knowledge of the President of the insolvency of his own firm was knowledge of the bank of its own insolvency, and that the fraud had been committed and that the deposited check, or its proceeds, could be recoveerd by the depositor.

In that case this court did not regard the improbability of the President of the bank communicating to the bank the insolvency of his firm, as cutting any figure in the case. The adversity of interest must be in the particular transaction in which the agent is engaged. In the case at bar it was impossible for the corporation to lose anything in the transaction by any failure of Plant to impart knowledge of his own indebtedness to the American Bank. The only result which could possibly follow would be to deprive the corporation of the privilege of gaining an unconscionable advantage over the American National Bank. It was a case where ignorance was bliss. The bank could not be hurt by withholding the

information. Had the corporation spoken, it might have said to Plant, withhold from me the facts, lest I be unable to perpetrate this wrong.

But the truth is, the idea of an agent of a corporation informing his principal of anything is mere fiction. Plant, being the absolute general manager of the bank was, for all practical purposes, principal. There was no higher authority for him to consult, or to whom he could impart information.

Plant by this transaction obtained nothing from the bank. It could not possibly be adverse to the interest of the bank that he paid $3,000.00. He was not obtaining a loan, but paying one. He was not trying to defraud the bank. The results of the payment as to the effect on the examination of the First National were such that both Plant and the bank were concurrently interested in the payment being made, and therefore it is utterly impossible to find in this transaction any conflict of interest, and in order to disqualify the agent, and cut off the doctrine of imputation, there must be conflict of interest in the particular transaction.

But there is no ground for presuming that Plant would not communicate, or would hesitate to communicate, to any other officer of the bank the fact that he was indebted to the American National Bank to the extent of $3,000,000, or even $50,000. His financial standing would not have been affected by such knowledge. Up to that time the other officers supposed him to be a very wealthy man—worth millions. A $3,000.00 debt was a very small thing for

him. And we have no need to invoke the doctrine of imputed knowledge except to that extent. The other officers actually knew of the notorious insolvency and bankruptcy. The imputed knowledge existed Saturday, when the check was received, and remained with the corporation Monday, when the knowledge of the other facts was acquired.

The Court misconstrued Findlay's testimony set out in Assignment of Error 3c. The Court construed Findlay as stating that he was in the habit of crediting any paper received "for credit" from any one. Now, it is immateiral what Findlay was in the habit of doing with other customers than Plant, and it is immaterial what he would have done had he been called upon to act upon this payment of Plant. He was not called upon to act upon it, and did not act, nor did he act on any paper turned in for any purpose by Plant, but we think that, taking the witness's whole statement together, he simply meant that if Plant had sent the papers turned in on May 14 to him, he would not have declined them *because Plant had sent them*. (Tr., 24; Qs. 219-221.)

We have already discussed the questions arising under Assignment 3 and Sub-Assignments 3a, 3c and 3d, and will add nothing further in regard to them.

As to Sub-Assignment 3b, the facts are that Hurt was a director, Vice-President and member of the Executive Committee of the First National Bank. The $3,000.00 check passed through his hands. We do not contend that he took any action on it, for the undisputed proof clearly shows he did not. Every-

body connected with the bank acted on the assumption, and correctly, that the sending in of the papers by Plant was ipso facto a decision by him on behalf of the bank, that the bank should receive them, and was conclusive. Nevertheless, the paper did pass through Hurt's hands. It was held by the Court of Appeals that there was no evidence that he knew of Plant's indebtedness to the American Bank. The evidence of his knowledge is that that indebtedness consisted of drafts drawn by Plant on the I. C. Plant Sons' Bank, and accepted by that bank. The proof shows that the banking business was kept entirely separate and distinct from Plant's other business, and was managed by Hurt, who had been the Cashier for twelve or thirteen years. It is not presumable that the Cashier of the bank did not know of this large indebtedness, or that the books of the bank failed to show it.

ASSIGNMENT NO. 4.

In this assignment plaintiff in error insists that the Court of Appeals was in error in holding that the request by plaintiff and defendant, respectively, had the effect of taking from the jury, and imposing upon the trial judge the duty of finding the facts. We understand that the right of a trial judge to instruct a verdict arises from the fact that in the opinion of the judge the testimony is so overwhelmingly in favor of the party moving for the instructed verdict that if the jury were to render a verdict in favor of the other party the Court, on motion for a new

trial, would set the verdict aside. When a plaintiff moves for an instructed verdict in his favor, his motion undoubtedly means that the evidence is so overwhelmingly in his favor that the Court would not allow a verdict against him to stand. It is his undoubted legal right, if the Court overrules the motion, to have his case submitted to a jury. He does not waive this right by making his motion, and cannot be presumed to have intended to waive it. There is nothing in the making of the motion that can possibly be construed as intending to waive it. There is nothing in the results of the motion, even if overruled, that can possibly have the legal effect of waiving it. The question, therefore, is whether the motive of the mover, or the legal effects of the motion, can either of them be changed by a similar motion made by the defendant. The import of the defendant's motion, like that of the plaintiff's, is that he insists that the evidence is so overwhelmingly in his favor that the Court would not allow a judgment against him to stand. It is equally clear that he expects, that if his motion is overruled, the case shall go to the jury. By his motion he has done nothing that implies, or can have the legal result, of waiving his right to a jury trial. The results of a motion made by one party cannot be modified by the making of a motion by the other party, much less can the intention of one party be modified by the making of the counter motion. Each motion, with its implied intention and its legal results, must stand upon its own basis, unaffected by anything done by the adverse party.

In the case of Beutell v. Magone, 157 U. S., 157; 39 L. Ed., 654, the Court decided as follows:

> "The request made to the court by each party to instruct the jury to render a verdict in his favor *was not equivalent to the submission of the case to the court*, without the intervening of a jury, within the intendment of Sections 649, 700 Revised Statutes."

But plaintiff's counsel insited before the trial judge that "The two motions were tantamount to taking the case away from the jury, or as a demurrer to the evidence." Plaintiff, therefore, "moved the Court to take the case and consider it on the testimony." In other words, the plaintiff insisted that the result of the two motions was exactly what this Court in Beutell v. Magone held it not to be.

It cannot be correctly said that the two parties, by the making of their respective motions, agreed upon anything; on the contrary, they stand at the very antipodes of a disagreement. The one is insisting that the evidence is so overwhelmingly in his favor that he is entitled to an instructed verdict, and the other is insisting that the evidence is so overwhelmingly in his favor that he is entitled to an instructed verdict. These are absolutely all of the implications which can be drawn from their respective motions. And yet the trial court seems to have been of the opinion that the effect of the two motions was exactly what this Court has decided that it was not, that is to say, that this effect was that the Court was called on to find the facts on the weight of the testimony.

The Court did proceed to do so. (Tr., 104 and 105.) We insist that the case of Beutell v. Magone was misconstrued by the trial judge, and has been frequently misconstrued by the Circuit and District Courts, and, as stated in the case of Menahan v. Grand Trunk West Ry. Co., 70 C. C. A., 463, 138 Fed., 37, decided by the Sixth Circuit C. C. A., Judges Lurton, Severens and Richards sitting.

> "And in all the cases in which the case of Beutell v. Magone has been cited in the appellate courts, the conditions were the same; there was *no disputed* question of fact, and there were no special requests. Merwin v. Magone, 70 Fed., 776, 17 C. C. A., 361; Magone v. Origet, 70 Fed., 778, 17 C. C. A., 363; Bradley Timber Co. v. White, 121 Fed., 779, 58 C. C. A., 55; United States v. Bishop, 125 Fed., 181, 60 C. C. A., 123; Phoenix Ins. Co. v. Kerr, 129 Fed., 723, 64 C. C. A., 251, 66 L. R. A., 569."

The same question now under consideration has recently been passed on by the Supreme Court of Tennessee in two cases. One case was Virginia, etc., Co., v. Hodges, Southwestern Reporter, Vol. 149, No. 12 (October 30, 1912), page 1056. The other case is that of King v. Cox, Southwestern Reporter, Vol. 151, page 58 (No. 1, December 25, 1912). In these opinions that Court, Judge Neil delivering the opinion, went into the whole subject and after very careful consideration held that the effect of these dual motions was not to take the case from the jury. The only power which the Court has is to sustain or to overrule one or the other of the motions and, unless he sustains one or the other, to submit the case to

the jury. The discussion in these cases is so convincing that we invoke for it a careful reading. We respectfully insist that the Court of Appeals was in error in not sustaining this assignment.

In view of the foregoing, it is insisted in behalf of the plaintiff in error, under assignments 5, 6 and 7, that the trial Court was in error in not directing a verdict in favor of plaintiff in error (defendant below), and was in error in directing a verdict in favor of the defendant in error (the plaintiff below), and in taxing the defendant below with the cost, and that the Court of Appeals was in error in not correcting these errors of the trial Court, and in affirming its judgment.

If, however, the Court should be of opinion that the testimony is not free from conflict, nor overwhelmingly enough to warrant an instructed verdict for plaintiff in error, then we insist that it at least did not warrant an instructed verdict for defendant in error, and that the case should be reversed and remanded for trial before a jury.

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